

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC DESHAWN MOORE,

Defendant-Appellant.

UNPUBLISHED

May 30, 1997

No. 183275

Oakland Circuit Court

LC No. 94-132534-FC

Before: Neff, P.J., and Wahls and Taylor, JJ.

PER CURIAM.

Defendant was convicted after a bench trial of four counts of first-degree criminal sexual conduct involving a weapon, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), and pleaded guilty to four counts of being an habitual offender, third offense, MCL 769.11; MSA 28.1083. On remand from this Court, defendant moved to withdraw his guilty pleas to the habitual offender charges. The trial court granted the motion, and dismissed the habitual offender convictions. Defendant was sentenced to four terms of 20 to 40 years' imprisonment, to be served concurrently. He now appeals as of right. We affirm.

I

Defendant argues that he was denied the effective assistance of counsel by trial counsel's stipulation to the admission into evidence of people's exhibit 1, the victim's clothing, and people's exhibit 3, the knife that was allegedly used in the assault. Defendant argues that by stipulating to the admission of the knife, trial counsel conceded an element of the crime, the use of a weapon, and contradicted defendant's sworn testimony that no weapon was used and that the victim consented to sex. By stipulating to the admission of the victim's clothing, defendant argues that trial counsel tacitly admitted that defendant's testimony regarding the victim's clothing was not true. We disagree.

To prove ineffective assistance of counsel, defendant must prove that trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Trial counsel is presumed competent, and defendant has the burden of proving that the complained of

conduct is not within sound trial strategy. *Id.* at 687. Because defendant did not move for a *Ginther*¹ hearing or a new trial on the basis of ineffective assistance of counsel, appellate review is limited to mistakes apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Defendant has not met his burden of proving that trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the outcome of the trial would have been different. Defendant appears to be arguing that defense counsel should have opposed the admission of the evidence because it was damaging to his case. Probative evidence of guilt is always prejudicial from a defendant's point of view. The relevant question is whether the evidence was unfairly prejudicial. *People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994). The record does not support a finding that defense counsel would have been successful in preventing the admission into evidence of exhibits 1 and 3. Therefore, defendant has not overcome the presumption that trial counsel's stipulation to the admission of the evidence was sound trial strategy.

A claim of ineffective assistance of counsel based on defense counsel's failure to object or make motions that could not have affected defendant's chances for acquittal is without merit. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986). Accordingly, defendant was not denied the effective assistance of counsel.

II

Defendant next argues that the prosecutor's reference to a knife when questioning the complainant was suggestive and denied him a fair trial, particularly in light of the fact that the use of a weapon was an essential element of the crime. However, defendant did not object at trial to the prosecutor's remark. Appellate review of alleged prosecutorial misconduct is generally precluded absent objection by counsel unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Stanaway, supra* at 687. Because we find that no manifest injustice will result, we decline to review this issue.

III

Defendant raises several issues in his brief on appeal pertaining to his guilty plea to the habitual offender charges. Because these issues were resolved in the trial court on remand from this Court, the issues are moot. See *People v Mansour*, 206 Mich App 81, 82; 520 NW2d 646 (1994).

Affirmed.

/s/ Janet T. Neff
/s/ Myron H. Wahls
/s/ Clifford W. Taylor

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).